Supreme Court, U.S.
FILED

97-237 JUN 19 1997

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1996

◆

Ellis R. Lewis, *Petitioner*,

v.

The BOCA Appeals Board of the City of Clarksburg; and the City of Clarksburg, *Respondents*.

and

Ellis R. Lewis, Plaintiff Below, *Petitioner*,

v.

John L. DePolo, individually and as agent for the City of Clarksburg; P. Douglas Gray, individually and as Chairman of the City of Clarksburg Code Enforcement Appeals Board; and the City of Clarksburg, Defendants Below, *Respondents*.

◆

On Petition for a Writ of Certiorari to the Circuit Court of Harrison County Division 2

◆

PETITION FOR A WRIT OF CERTIORARI

◆

Ellis R. Lewis, *Pro Se*
P.O. Box 2403
Riverside, Ca. 92516
(909)685-6675

---

36 pp

QUESTIONS PRESENTED

1. Whether after condemning an apartment building under a flood plain ordinance, denying a permit to repair, and denying compensation for loss of all economic uses of the land, a city may use its police power to: (1) order the building demolished at the owner's expense, when no emergency is alleged, (2) issue a criminal charge for failure to maintain the building, (3) seek fines and incarceration if the owner is unable to demolish the building, and (4) seek a prospective judgment for the cost of demolition, without violating the owner's Fifth and Fourteenth Amendment rights?

2. Whether Fifth Amendment guarantees of due process are violated when a state circuit court judge grants summary judgment, without a motion by one of the parties, without notice, without discovery, and without the right to present evidence, when complex claims of inverse condemnation, trespass and contract violations have been alleged?

PARTIES

The parties to the underlying proceeding for which review is sought are:

Petitioner/Plaintiff below:

Ellis R. Lewis

Respondent/Defendants below:

The BOCA Appeals Board of the City of Clarksburg

The City of Clarksburg

Defendants below:

John L. DePolo, individually and as agent for the City of Clarksburg

P. Douglas Gray, individually and as Chairman of the City of Clarksburg Code Enforcement Appeals Board

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case 3
Purchase of the property 3
Initial observation of storm drainage problems. 4
Condemnation notice citing the Flood Plain Ordinance 6
Demolition Order without option to repair and threats of fines and incarceration 7
BOCA Board ruling 7
First appeal of BOCA Board's ruling to the Circuit Court and remand 8
Second appeal to Circuit Court, and *Complaint for Declaratory Judgment* 9
Lewis brings suit for breach of contract, trespass, inverse condemnation, etc. 9
Pretrial briefs and rulings in Division 1. 10

TABLE OF CONTENTS - Continued

Motions to dismiss and denial of discovery in Division 2 10
Summary judgment absent motion, notice, discovery and opportunity to respond 11
Appeal to Supreme Court of Appeals for West Virginia 12
Postscript: demolition and new evidence 13

Reasons for Granting Certiorari 13
1. The decision below conflicts with decisions of this Court and other courts finding inverse condemnation liability because of flood plain ordinances: 14
Application of the flood plain ordinance 14
No trespass without compensation 15
Impact on economic use, investment backed expectations and right to repair 15
Original title granted use 16
Abuse of the police power 17

2. The decision granting prospective injunctive relief conflicts with this Court's decisions that authorize such punitive destruction only in cases of emergency or imminent danger 17

3. The manner in which the Circuit Court of Harrison County acted denied Lewis his right to due process of law 19
Notice announced by judge on day of ruling 19

Discovery denied 20
No opportunity to present evidence 21
Burden of proof 21

Conclusion 23

Appendix App. Page #

I. Opinions, Orders, Findings of Fact and Conclusions of Law of Circuit Court of Harrison County Division 2 1

1. Stay of Judgment Order, Entered September 18, 1995 1
2. Judgment Order, Entered August 3, 1995 3
3. Findings of Fact and Conclusions of Law, Entered Nunc Pro Tunc the August 3, 1995, September 18, 1995 5
4. Protective Order, Entered June 8, 1995 12
5. Order, Entered May 17, 1995 14

II. Opinions, Orders, Findings of Fact and Conclusions of Law Entered by Other Courts and Administrative Agences 17

6. West Virginia Supreme Court of Appeals Rejection of Leave to File Petition for Second Petition for Appeal, Entered May 1, 1997 17
7. West Virginia Supreme Court of Appeals Order Petition Refused, February 20, 1997 18
8. West Virginia Supreme Court of Appeals Order to Supplement the Record, May 30, 1996 20

9. Harrison County Circuit Court Order Prospective on Declaratory and Injunctive Relief, Entered July 21, 1994 — 22

10. Harrison County Circuit Court, Findings of Fact and Conclusions of Law, Entered July 21, 1994 — 23

11. Harrison County Circuit Court Order Regarding City's Right to Demolish Building and Institute Criminal Proceedings, Entered June 12, 1992 — 26

12. Decision of the BOCA Appeals Board of the City of Clarksburg, November 6, 1991 — 27

13. Harrison County Circuit Court, Remand Order, Entered June 11, 1991 — 31

14. Demolition Order, August 9, 1990 — 33

15. Condemnation Notice, May 23, 1986 — 35

III. Constitutional Provisions — 36

16. U.S. Constitutional Amendments, Article V, Article VI, Article XIV — 36

IV. Statutes, Ordinances and Regulations — 37

17. West Virginia Code, Rules of Civil Procedure, Rule 56. Summary Judgment, Rule 57. Declaratory Judgments — 37

18. West Virginia Code, Chapter 29A, State Administrative Procedures Act — 39

19. West Virginia Constitution, Article 3, § 10, Article 3, § 17 — 40

20. Clarksburg Ordinances, Article 1725 Building Inspector, Article 1747 Flood Control 41

21. Clarksburg Maintenance Code Appeals Board Bylaws 43

V. Place in the Suit or Briefs Where Constitutional Issues are Raised 46

22. Petition for Appeal, October 25, 1995 46

23. "BOCA" BRIEF, October 6, 1994 49

24. Plaintiff's Amended Complaint, July 7, 1994 54

25. Plaintiff's Response to Defendants' Brief in Support of Motion to Dismiss, December 22, 1993 66

26. Petitioner's Response to Preemptive Indemnication Brief, November 5, 1993 69

27. Statement of Issues, October 26, 1992 73

28. Counterclaim and Complaint for Declaratory Judgment, September 29, 1992 77

29. Amended Petition for Appeal June 24, 1992 78

30. Memorandum in Support of Petitioner's Motion to Set Aside BOCA Appeals Board Order, October 22, 1990 80

31. Petition to Modify and/or Withdraw BOCA Citation 272 - 300 Monticello Avenue, August 24, 1990 82

VI. Other Material 84

32. Transcript of Day of Summary Judgment 84

33. Notice to Redeem Delinquent Real Estate, November 9, 1994 107

34. Denial of Request to Repair, May 20, 1986 108

35. Memo on Storm Sewer Improvements, June 23, 1981 108

36. Structural Soundness, August 15, 1980 109

37. Compliance with Flood Plain Ordinance, August 13, 1980 110

38. Right of Way Agreement, December 16, 1958 110

TABLE OF AUTHORITIES

Cases	Page
Agins v. City of Tiburon, 477 U.S. 255 (1980).	15
Albert v. Mountain Home, (Idaho) 337 P2d 377. . . .	16n
Anderson v. Liberty Lobby, 477 U.S. 242	20, 22n
Application of Suffern, 12 App Div 2d 769, 209 NYS2d 599	16n
Aurora v. Meyer, 38 Ill 2d 131, 230 NE2d 200	16n
Brooks v. Hussman Corp., 878 F. 2d 115 (3d Cir. 1989)	20n
Celotex Corp. v. Catrett, 477 U.S. 317	20, 20n, 22n
Childs v. Anderson, 344 Mich 90, 73 NW2d 280 . . .	16n
Colgan v. Fisher Scientific Co., 935 F 2d 1407, (3d Cir.) 502 U.S. 941 (1991)	22n
Cool Fuel, Inc. v. Connett (9th Cir, 1982) 685 F2d 309	18n, 20n
Costello, Porter, Hill, Heisterkam & Bushnell v. Providers Fidelity Life Ins. Co., 958 F 2d 836 (8th Cir. 1992)	19n, 21n
DiMartini v. Ferrin (9th Cir. 1989) 889 F2d 922 . . .	21n
Dooley v. Town Planning and Zoning Commission (Conn. 1964), 197 A 2d 770	14n
First English Evangelical Luthern Church of Glendale v. Los Angeles County,482 U.S. 304 (1987)	10, 14
FMC Corp. v. WV Human Rights Comm'n 403 SE2d 729 (WV 1991).	9n
Goldblatt v. Town of Hempstead, 369 U.S. 590 at 593 (1962)	17
Hadacheck v. Sebastian (1915), 239 U.S. 394	18n

Hairston V. Danville & Western Ry.Co., 208 U.S. 598 ..... 15n

Horton v. Gulledge, 277 N.C. 353, 177 S.E. 2d 885 16n

Inman v New Hartford, (1986, 4th Dept) 116 App Div 2d 998, 498 NYS2d 618 ..... 16n

Jarvis v. Baltimore, 248 Md 528, 237 A2d 446 ... 16n

Loretto v. Teleprompter Manhattan CATV Corp.,458 U.S. 419 (1982) 13

Lucas v. South Carolina Coastal Council, 505 US, 120 L Ed 2nd 798, 112 S Cr 2886 (1992) 16, 16n, 17

Management Investors v. United Mine Workers of America, C.A. 6th, 1979 610 F2d 384 ..... 20n

Maritrend, Inc. v. Galveston Wharves, D.C. Tex. 1993 152 F.R.d.543. ..... 21n

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 21n

McClung v. Marion County, 360 S.E.2d 221 (W. Va. 1987) 19n

Miller v. Schoene (1928) 276 U.S. 272 ..... 18n

Newton v. Highland Park, (Tex Civ App) 282 SW2d 266 ..... 16n

Nollan v. California Coastal Commn. (1987) 483 U.S. 825 ..... 13n

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 15

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 15, 17

Portsmouth Square v. Shareholders Protective Comm. (9th Cir. 1985) 770 F2d 866, 869 ..... 21n

Poughkeepsie v Clifford, (1986, 2d Dept) 120 App Div 2d 695, 502 NY S 2d 768 ..... 16n

Scott v. Courtesy Inns, Inc. C.a. 5th 1973, 472 F 2d 563 ..... 20n

Sempier v. Johnson & Higgins, 45 F 3d 724 (3d Cir.) 1995 . . . . . 22n

State Ex Rel State Line Sparkler v. Teach, 418 S.E. 2d 585 W.Va. (1992) 18n

U.S. v. J.B. Williams Co., C.A. 2d, 1974, 498 F.2d 414 . . . . . 21n

White v. Texas Am. Bank/Galleria, N.A. 958 F. 2d 80 (5th Cir. 1992) 20n

Yee v. City of Sausalito, 141 Cal. App.3d 917, 190 Cal. Rptr 595 (1983) 15, 15n

Constitutional Provisions, Rules and Statutes

Clarksburg Flood Plain Ordinance 1747 . . . . . 2, 3,6

Clarksburg Ordinance 1725 . . . . . 2, 7, 18n

Federal Rules of Civil Procedure, Rule 57 19

United States Constitution, Amendment 5 . . . . . 1, 2, 10, 12n, 15n, 17, 19, 22

United States Constitution, Amendment 6 . . . . . 2, 19, 22

United States Constitution, Amendment 14 . . . . . 2, 10, 12n, 15n, 22

West Virginia Adminstrative Procedures Act (Code 29A). 2, 12

West Virginia Code 8-16-12 . . . . . 18n

West Virginia Rules of Civil Procedure, Rule 56 . . . 2, 9, 18

West Virginia Rules of Civil Procedure, Rule 57 . . . 2, 19

Miscellaneous

Ann R. Barker, "Inverse Condemnation and the New Takings Statute," April 17, 1996, *Local Government Seminar*, Austin, Texas.

"Locklin v. City of Lafayette: Storm Drains - A Property Owner's Tidal Wave," *UWLA Law Review*, Vol. 25

The Oxford Companion to the Supreme Court of the United States, Kermit L. Hall Ed. New York: Oxford University Press, 1992

Proceedings, Washington Institute on the Federal Rules of Civil Procedure, 1938

"Property Rights," *CQ Researcher*, Vol.5, no.22, 513-536.

"West Virginia's Very Own Celotex Trilogy," *West Virginia Law Review*, Volume 98, Winter 1996, Number 2.

OPINIONS BELOW

Lewis v. The BOCA Appeals Board of the City of Clarksburg; and the City of Clarksburg

Lewis v. DePolo, Gray, and the City of Clarksburg

Stay of Judgment Order, Entered September 18, 1995 (Appendix No. 1)

Judgment Order, Entered August 3, 1995 (Appendix No. 3)

Findings of Fact and Conclusions of Law, Entered Nunc Pro Tunc the August 3, 1995, September 18, 1995 (Appendix No. 5)

Protective Order, Entered June 8, 1995 (Appendix No. 12)

Order, Entered May 17, 1995 (Appendix No. 14)

◆

JURISDICTION

This case involves the unlawful taking without compensation of a twenty-seven unit apartment building that formerly housed elderly and low-income residents. The Respondents damaged the property by the malfunctioning of their municipal storm drainage works and then used the damage as an excuse to condemn the property without paying for it. The petitioner sought relief under the Fifth and Fourteenth Amendments to the U.S. Constitution because the Respondents had taken his property without due process of law, and denied him equal protection of the laws.

The federal questions were raised early in the litigation (due process was raised when this case was filed on August 24, 1990;[1] claims of compensation were first raised during the administrative hearing held by the BOCA appeals

[1] Appendix page 82.

board,[2] federal constitutional claims to compensation were first raised on November 5, 1993[3]) and pursued throughout. The Circuit Court of Harrison Country Division 2 issued Summary Judgment orally on June 23, 1995[4] and by Judgment Order, August 3, 1995.[5] The Supreme Court of Appeals for West Virginia refused a petition for appeal without explanation on February 20, 1997. This Court granted a thirty day extension to the ninety days allowed for filing a petition for certiorari on May 13, 1997.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 5

United States Constitution, Amendment 6

United States Constitution, Amendment 14, Section 1

West Virginia Rules of Civil Procedure, Rule 56 and Rule 57

West Virginia Code, Chapter 29A, State Administrative Procedures Act

West Virginia Constitution, Article 3, § 10, Article 3, § 17

---

[2] September 12, 1990 "...the City could have and perhaps should have condemned my building, torn the building down..., and compensated me for the loss of my income." (BOCA Minutes pg. 186). On October 3, 1990, Lewis said, "...It is clearly a proper use of block grant funds, ...of UDAG repayments to clear blighted areas, to tear the building down, to pay me for it even." (BOCA Minutes pg. 196).

[3] Appendix page 72.

[4] Appendix pages 84 - 106.

[5] Appendix page 3.

Clarksburg Ordinances, Article 1725 Building Inspector, Article 1747 Flood Control

STATEMENT OF THE CASE

This is a case where a city's public works damaged an apartment building and the City then used that damage as an excuse to condemn the apartment building under a flood plain ordinance with no compensation to the owner. The city rejected claims of contract responsibilities related to problems with its own sanitary sewer line and payment for trespass due to a faulty storm drainage system. Instead, it sought fines and imprisonment if the owner failed to demolish the building at his expense.

Purchase of the Property - Ellis R. Lewis (herein after Lewis) purchased a twenty-seven unit apartment building on the eastern bank of Elk Creek in downtown Clarksburg, West Virginia, in January 1980, and began immediate renovation of the circa 1913 structure. The city certified the project's compliance with the city's Flood Plain Ordinance 1747[6] and the building's structural soundness.[7] Permits were issued, and five years of major renovations valued at over $250,000[8] were undertaken. Much of the work was done by Lewis, himself. In addition, Lewis purchased neighboring land to provide parking and a playground. By 1982 the building was

---

[6] Clarksburg's City Engineer Hugh Marsh issued certification on August 13, 1980. Appendix 110.

[7] Water Board engineer Henry Trasher approved on August 15, 1980. Appendix 109.

[8] Addressing code deficiencies, providing new electrical services, renovating kitchens and bathrooms, and installing new copper water lines and schedule 40 wastes.

formally appraised at $301,600.[9]

Initial Observation of Storm Drainage Problems - Suspecting storm drainage problems due to the presence of large masses of ice in the street in front of the building and observable soil settling adjoining the building's upper retaining wall, in June of 1981, Lewis contacted the city manager.[10] Following engineering studies by MSES Engineers, public hearings, and a legal opinion (unknown to Lewis until well after 1990)[11] that found possible liability for the city with a potential condemnation of the building, the city received federal block grant moneys to remedy the problem in October of 1984. The block grant application was specifically earmarked

---

[9] The parties to the suit have not agreed upon a valuation for the building after 1982. Regular work to renovate the apartments continued throughout 1983, 1984 and 1985.

[10] Appendix 108.

[11] Consultant to the City, Attorney J. Michael McDonald, of McNeer, Highland & McMunn, wrote to Clarksburg's Community Development Agency on May 8, 1985. On page 3 of his *Memorandum - Re: Monticello Avenue Water Project*, he wrote "The city has been put on notice of the existence of a condition which could endanger human life as well as property." His nine page memorandum analysed the types and degree of legal responsibility the city would incur if it did or did not drill to establish the flow of surface or subsurface waters, and detailed the parties the city should notify of potential adverse affects. On page 7 he wrote, "...it is our opinion that the City should proceed with the drilling project. " He recommended that if the city wanted to construct additional pipelines that they "should approach the owner and request that he pay for the construction of the pipeline system in front of the building," (page 8) or, share the cost with the apartment owner, or, "condemn the two to three foot strip of property in front of the apartment building necessary to install the collection system. The last alternative would not only involve the cost of the collection system, but would also require that just compensation to paid to the owner of the property for the taking of this land. However, given the very expensive nature of constructing the line on the east side of Monticello Avenue, this alternative could prove more cost efficient." (page 8-9).

for this building. The city's application stated, "A 27-unit apartment house, occupied primarily by elderly and low income residents, is being adversely affected by the water conditions." The work to remedy the problem was not begun until 1987, however, and at this writing remains unfinished.

The city's storm drainage system collected storm waters from several blocks and discharged the water from a ten inch drain pipe into a porous channel directly opposite and above petitioner's building. Each time it rained water flowed across and under adjoining Monticello Avenue, saturated the soil abbuting the building's foundation and upper retaining wall, and increased lateral forces acting upon the wall. Five consulting engineers and City Engineer George Duffer agreed the retaining wall was distressed by lateral pressures.[12]

The city's diversion of water in its storm drain system and failure to comply with contractual obligations for a sanitary sewer easement were alleged by Lewis to be proximate causes of the progressive failure of portions of the foundation,[13] exacerbated when, on November 5 and 6, 1985, Elk Creek flooded and water rose under the building, inundating the foundation and furthering its erosion. Storm water caused no direct damage to occupied living spaces and no tenants were displaced.

---

[12] On August 2, 1996 George Duffer wrote a four page analysis detailing damage to the foundation. In April of 1985, prior to the flood, a study was done by Mountain State Environmental Services, damage assessment after the flood was conducted by Thrasher Engineering, and later studies were done by Onas Aliff, Larry Luttrell and Glen Dyer.

[13] Expert testimony from Onas Aliff, Civil Engineer, and Dr. Larry Luttrell, Civil Engineering Professor from the West Virginia University School of Engineering corroborate these findings, but their depositions were not allowed to be submitted into evidence.

Condemnation Notice Citing the Flood Plain Ordinance - Lewis requested permits to repair the flood damaged foundation on May 20, 1986.[14] In spite of the city's role in causing the damage, Lewis (at that time) was going to do the repairs at his own expense. Clarksburg issued a denial to repair or make additional renovations.[15] On May 23, 1986, the city issued a *Condemnation Notice*[16] citing Flood Plain Ordinance 1747.09.

Lewis paid the full cost of relocation for all of his tenants. The building was vacated by August 15, 1986. Lewis was responsible for keeping the building boarded up and safe. It was never alleged that he failed to do so.[17]

Lewis was not informed of any statutory or constitutional rights to compensation, nor was he allowed to salvage valuable materials from the site to offset his losses[18] or pay for demolition of the structure. Instead he was advised that his only recourse was to contact the Small Business Administration (SBA) for a loan. Seeing this as a possible way to obtain partial compensation for his loss, and unaware of Constitutional rights to inverse condemnation due to loss under a flood plain ordinance, or the attorney's memorandum to the city regarding the city's responsibility for the storm drain system, Lewis pursued disaster loan funding. The SBA funded the loan, but cancelled after the city and the leinholder

---

[14] The cost of repairs is in dispute. Lewis claimed under $100,000, while the city estimates were closer to $200,000.

[15] Appendix 108.

[16] Appendix 35.

[17] Lewis allowed the property to be taken for taxes on November 23, 1992, but retained a legal interest in the building until it was purchased by the Urban Renewal Authority of the City of Clarksburg on December 1, 1994 for the value of the unpaid taxes. Lewis had paid taxes on the property through 1991. Appendix 107.

[18] The lienholder bank demanded that salvage be halted.

informed the SBA that they were considering rescission of the condemnation order. Lewis sued the SBA, and Clarksburg, Clarksburg Officials and the leinholder bank (the latter three for tortious interference with his loan request) in federal court. That court issued summary judgment ruling that the SBA had discretion to deny loans without a reason, and Lewis therefore had no expectancy with which to interfere.

Demolition Order Without Option To Repair With Threats of Fines and Incarceration - Four years after condemnation (with his federal suit against the city pending) on August 9, 1990, a *Demolition Order Without Option To Repair*[19] threatened fines and incarceration and brought Lewis before the City's BOCA Code Enforcement Board (Board). Lewis sought access to City files to document his over six year relationship with the city's Community Development (CD) office, which included two formal applications for funding. Only three letters were found in the CD files.[20] The Engineering Department files, required by Clarksburg Ordinance 1725.03c, were entirely missing.

BOCA Board Ruling - On August 24, 1990 Lewis filed a *Petition to Modify and/or Withdraw BOCA Citation*[21] noting the availability of federal disaster funds to the city at the time of issuance of the condemnation order, and asserting that, "The city should waive or be restrained from asserting any liens, penalties, costs or imprisonment against petitioner...." On October 4, 1990, the Board, without factual findings, ordered Lewis to begin demolition within 30 days and complete it within 120 days after that.

---

19 Appendix 33.

20 Lewis retained in his own files numerous documents and two sets of plans and specifications.

21 Appendix 82.

First Appeal of BOCA Board's Ruling to the Circuit Court and Remand - Lewis appealed to the Circuit Court of Harrison County, Division 1, case number 90-C-780-1 ('90 case). The court remanded, requiring findings of fact and consideration of modification evidence.[22] While preparing for the next hearing, Lewis discovered a sanitary sewer easement which contained city guarantees of the building's structural integrity (because of the proximity of the city's sewer line).[23] Reasserting the claims set forth in his appeal, Lewis prepared a "*BOCA Appeal Remand,*"[24] made claims regarding the sanitary sewer, and reminded the Board that the original condemnation was under the flood plain ordinance. These documents were submitted to the Board, but were never considered by the Board as called for by the remand order.[25] The remand resulted in a decision of the Board affirming the *Demolition Order Without Option to*

---

[22] Remanded on April 20, 1991. Appendix 27.

[23] A copy of this document was placed in the BOCA record. Lewis alleged that Clarksburg was in violation of the sewer easement in that the sewer encroached within the required setbacks from the buildings foundation. *Change order #2* (illustrated on a map) included installation of a large combination sewer bisecting the foundation. Lewis sought the change order with a Freedom Of Information Act request, but was informed the documents could not be found.

[24] It included twenty-one reasons for modification of the demolition order, and a "*Factual Statement*" identifying documents and deposition testimony.

[25] "Mr. DePolo stated that he did not feel, that in the judge's [McCarthy's] order, that evidence could be presented at this time that have(sic) not been considered at the last hearings." The documents were not found in the BOCA Board's records. However, counsel for the city later stipulated to their inclusion in the record on appeal to the Circuit Court on September 27, 1994. Board Attorney DePolo had advised the Board that, "...he has the right, under the code, to appeal this decision to the Circuit Court. The Circuit Court can then listen to every argument he has."

Repair on November 6, 1991.[26]

Second Appeal to Circuit Court and Clarksburg's *Complaint for Declaratory Judgment* - Lewis' Amended Appeal to the Circuit Court of Harrison County was filed on June 24, 1992.[27] Clarksburg responded with a motion to dismiss and a request for declaratory judgment in the amount of $160,000. Lewis alleged that this was an improper action within administrative appeal,[28] as the adminstrative proceeding was criminal in nature and the declaratory judgment action was civil. Lewis counterclaimed arguing that Clarksburg was responsible for the storm and sanitary sewers, could obtain of federal moneys to demolish flood damaged property, and lacked of evidence in support of the $160,000 anticipatory costs for demolition.[29]

Lewis Brings Separate Civil Suit for Breach of Contract, Trespass, Inverse Condemnation, Etc. In 1993, Lewis filed a new civil suit against Clarksburg ('93 case)[30] alleging breach of contract[31] (Count VII), trespass (Count

---

[26] Appendix 27.

[27] Appendix 78.

[28] In *FMC Corp. v. West Virginia Human Rights Comm'n*, 403 S.E. 2d 729 (W.Va. 1991) that court held that, "An administrative proceeding on appeal in circuit court cannot be transformed into an action at law for damages."

[29] September 29, 1992.

[30] Complaint 93-C-792-1 was filed October 7, 1993. Lewis had lost his federal suit in 1992. Lewis was advised by Judge McCarthy that he had the right to file such a suit. The '93 case, a civil suit, operated on different legal principles than the '90 case and addressed issues never raised in any court by Lewis. In the '90 case Lewis sought to show that he was not responsible for demolition, but with the '93 he sought compensation for his loss.

[31] Lewis did not become fully aware of the degree of the breach of contract, or that a contract existed until 1991. Minutes of the BOCA meeting held on October 7, 1991 note that, "Mr. Rodd showed deeds for the right-of-was(sic) acquired by the City for this sewer and there were

VI), inverse condemnation (Count IV), failure of the City's engineering department to maintain records (Count VIII) and other tort claims. On December 7, 1993, on the court's own motion, the new '93 case was transferred to Division 2.

Pretrial Briefs and Rulings in Divisions 1 for '90 case - Judge McCarthy ordered the parties, to brief whether the City had, under any circumstances, legal right or authority to obtain prospective declaratory or injunctive relief requiring an owner to undertake an affirmative act to demolish a building.[32] On July 21, 1994, Judge McCarthy held in favor of the prospective declaratory or injunctive relief question, upon findings, and transferred the '90 case to Division 2, as well. Unfortunately, no record exists of Division 1 proceedings.[33]

Motions to Dismiss and Denial of Discovery in Division 2 - In Division 2, Judge Bedell entered a detailed scheduling order for discovery and a trial date. Judge Bedell said that orders and motions for the two cases would be considered on the same days for convenience. Lewis prepared a brief, including arguments based in part upon this Court's ruling in *First English Evangelical Lutheran Church v. Los Angeles County* 482 U.S. 304 (1987) and raised Fifth and Fourteenth Amendment claims.[34] Motions to Dismiss were filed by Clarksburg's attorneys.[35] Lewis filed interrogatories,

---

several clauses in these deeds stating that the City would have responsibility for the integrity for the upper retaining wall. (Mr. Rodd produced actual copies of the deeds) The deeds stipulated that the City would retain a continuing liability for any problems associated with failure of the storm drains." (BOCA Minutes pg. 222).

[32] The city filed its brief on October 7, 1993. Lewis filed a pro se Response Brief, to which the City filed a Reply Brief.

[33] Lewis alleged that this was a violation of his due process rights.

[34] Appendix 69.

[35] Motions to Dismiss were filed on November 15, 1990, September 29, 1992 and November 4, 1993, but no substantive response was made by the city to Lewis' claims in the Counterclaim or in his 1993

requests for admissions and requests for production in both cases. The city filed motions for protective orders, which were granted at the April 5, 1995 hearing[36] resulting in a denial of discovery to Lewis and his attorney. The request for protective orders cited "effort.., time.., expense... and the [lack of the Court's] ruling on pending motions to dismiss."

Summary Judgment Without Motion, Notice, Discovery and Opportunity to Respond - Finally, on June 23, 1995 at a hearing on the motions to dismiss, the court announced summary judgment. No motions for summary judgment were filed by either party under West Virginia Rules of Civil Procedure 56. No notice was given that summary judgment would be considered as required by Rule 56. Judge Bedell stated that the '90 case was not a jury issue and affirmed the BOCA Board's decision. The judge stated that under new interpretations of Rule 56 he had discretion to change a hearing for a motion to dismiss to a hearing for summary judgment in the '93 case. Lewis' attorney objected to the summary judgment,[37] but the court granted summary judgment for the defendants in the '93 case.

On August 3, 1995 Judge Bedell issued a *Judgment Order*,[38] which incorporated by reference *Findings of Fact*

Complaint.

[36] Order entered May 17, 1995 and extended . Appendix 12.

[37] Trial counsel objected to the lack of notice, denial of discovery and lack of opportunity to present argument and evidence against granting of a summary judgment motion. Judge Bedell responded by stating, "Okay, counsel, let me note all that for the record and I have a sneaky suspicion that someone may look over my shoulder on this and that's fine. Not to be glib about it, but my paycheck will come at the end of the month whether they reverse me or whether and have me and think that I am the world's dumbest or laziest judge like the former Justice Neeley or whatever." (errors of grammar in original transcript Appendix page 106).

[38] Appendix 3.

and Conclusions of Law, entered on September 20, 1995, *nunc pro tunc* August 3. The court: [1] affirmed the BOCA Board rulings (which included the provision for fines and incarceration after April 2, 1992) applying an Administrative Procedures Act standard; [2] dismissed with prejudice the Petition for Appeal in Civil Action No. 90-C-780-2; [3] was silent on the specifics of the $160,000 declaratory judgment action, but did find that the right to obtain prospective judgment was the law in this case; [4] granted summary judgment for the city in Civil Case 93-C-792-2; [5] found that contractual obligations and trespass allegations, while possibility legitimate, were filed outside the statute of limitations which he ruled started in 1980 or 1985 at the latest; [6] was silent on the numerous factual issues raised in Lewis' *Statement of Issues;* and [7] was silent on the issue of inverse condemnation.[39] Judge Bedell issued a stay of his order, "until a final determination is made by the Supreme Court of Appeals of West Virginia."

Appeal to Supreme Court of Appeals for West Virginia - Lewis appealed to the Supreme Court of Appeals for West Virginia on October 25, 1995.[40] On February 20, 1997 that court "refuse[d] said petition for appeal," without comment. A *Notice of Appeal* was filed with that court on March 19, 1997. A *Renewal of Petition* was filed with that court on April 30, 1997 reasserting Constitutional claims and apprising the court of the evidence of the faulty storm drain and sewer system gathered when the building was demolished

---

[39] Conclusions of Law #19 (appendix page 10) states that Count IV deals with procedural irregularities. Reference to Appendix page 61 will illustrate that Count IV deals with inverse condemnation.

[40] The appeal included Lewis' claim to "constitutional safeguards when a person's property and liberty interests are potentially or actually subject to adverse state action." (Appeal page 17.) Argument 16 of the Appeal repeated Lewis' takings issue argument and reasserted Fifth and Fourteenth Amendment claims.

in 1996. The *Renewal of Petition* was denied on May 1, 1997.

Postscript: Demolition and New Evidence - When the city's Urban Renewal Authority finally demolished the building in the fall of 1996, more than ten years after condemnation, removal of the building and portions of the foundation brought an immediate collapse of the adjacent Monticello Avenue. Two sanitary sewer lines which were once under the building had to be rebuilt. Only emergency placement of 11,000 tons of large aggregate (rock) at the site could stabilize the hillside. This confirmed Lewis' claims of storm sewer and sanitary sewer impacts upon the building's foundation.

REASONS FOR GRANTING CERTIORARI

The facts in this case apply to the legal and financial misfortunes of one man, but the implications of the lower court's ruling and its actions have relevance for every American. We are taught to believe that in this country every person has due process rights. We are taught that the government cannot take your property without compensation in eminent domain. We are not taught the complex nuances of inverse condemnation. As Justice Stevens once put it, "even the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[41] Nor do current law or the Court's policy require that citizens be informed of their rights. We Mirandize those arrested, but we do not mandate informing property owners of their rights when government acts against their financial interests or threatens incarceration. If the Court fails to act on this case it sends a dangerous message to Clarksburg, West

---

[41] Nollan v. California Coastal Commn. (1987) 483 U.S. 825,866 (dissenting opinion).

Virginia (where media coverage has been extensive) and to towns across America: you can condemn property, you can violate due process, and you can reap financial rewards for doing so, or at least you can avoid financial responsibility. To allow the actions taken against Lewis to stand is to encourage other cities and states to act similarly. Thousands of property owners - victims of flood, tornado, earthquakes and hurricanes, and negligent city governments - could find their property condemned, the opportunity to salvage items from their homes and businesses or to repair them refused, and then be sued by their government as criminals for the condition of their property.

1. The decision below conflicts with decisions of this Court and other courts finding inverse condemnation liability because of flood plain ordinances:

This case originates with a regulatory "taking." This Court has consistently held that just compensation is guaranteed by the Fifth and Fourteenth Amendments when a public entity "takes" private property without initiating eminent domain under several circumstances. In every non-emergency instance appropriate due process is necessitated.

Application to Flood Plain Ordinance - The case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) is directly on point here. In that case the Court found a rule of liability with respect to application of flood plain ordinances. In the issue now before this court, the "taking" is effectively permanent, clearly a stronger application than that in *First Evangelical.*[42]

---

[42] See also *Dooley v. Town Planning and Zoning Commission* (Conn. 1964) 197 A 2d 770, 773-774, finding a taking because of the use prohibition in a flood plain ordinance.

No Trespass Without Compensation - Starting with *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).[43] this Court has required compensation when a public right of way, even one underground, such as the faulty storm drain system or the sewer line in this case, trespasses upon private land. This argument is strengthened by the ruling in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982) which found that any permanent physical occupation of property, no matter how slight, amounted to a taking.

In a California case, *Yee v. City of Sausalito*, absolute liability was imposed when diverted water from a collapsed storm drainage scheme caused property damage.[44]

Impact on Economic Use, Investment Backed Expectations and Right to Repair - With *Agins v. City of Tiburon* 477 U.S. 255 (1980) this Court established an impact test for the application of inverse condemnation, or regulations that have an undue impact on landowners depriving them of all practical uses, all reasonable uses, all beneficial uses, or all economic uses of their property. Similarly, in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the Court added the extent to which the regulation has interfered with "distinct investment-backed expectations." Lewis clearly had distinct investment-backed expectations for an economic use of his property. He had invested over $250,000 in repairs and upgrades alone. This was a rental property. It generated an income stream and significant tax dollars. It had been functioning as an apartment

[43] "...The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605, 28 S. Sup. Ct. 331, 13 Ann. Cas. 1008.

[44] *Yee v. City of Sausalito*, 141 Cal. App.3d 917, 190 Cal. Rptr 595 (1983).

building for decades, and Lewis knew that when he bought it.

When the city denied him a permit to repair, they denied him the opportunity to repair the foundation even at his own expense. The decisions of the West Virginia courts upholding this denial conflict with other state court decisions. Those decisions reflect a general presumption that where no emergency exists, owners must be afforded the opportunity to repair damaged structures. While the cost of allowable repairs relative to value of the structure varies, there appears general consensus that the structure must be beyond reasonable repair before the government can deny a repair permit.[45]

Original Title Granted Use - In *Lucas v. South Carolina Coastal Council*[46] this Court summarized and expanded upon its previous rulings and held that inverse condemnation only applied if the original title to the property allowed the desired use. This case satisfies the *Lucas* formulation,[47] Lewis' original title included the right to an apartment building; he was not attempting to use the property for a new purpose. If, as called for in *Lucas*, "case-specific inquiry" were applied, one would find that Lewis had suffered a "physical invasion" of his property. And finally, as called for

---

[45] *Inman v New Hartford* (1986, 4th Dept) 116 App Div 2d 998, 498 NYS2d 618; *Poughkeepsie v Clifford* (1986, 2d Dept) 120 App Div 2d 695, 502 NY S 2d 768; *Albert v. Mountain Home* (Idaho) 337 P2d 377; *Aurora v. Meyer*, 38 Ill 2d 131, 230 NE2d 200; *Childs v. Anderson*, 344 Mich 90, 73 NW2d 280; *Application of Suffern*, 12 App Div 2d 769, 209 NYS2d 599; *Newton v. Highland Park* (Tex Civ App) 282 SW2d 266; *Jarvis v. Baltimore*, 248 Md 528, 237 A2d 446. *Horton v. Gulledge* 277 N.C. 353, 177 S.E.2d 885, 890 (1970).

[46] *Lucas v. South Carolina Coastal Council* 505 US 1003, 120 L Ed 2nd 798, 112 S Cr 2886 (1992).

[47] "...the state may resist an asserted right to compensation ...only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with..."

in *Lucas*, Lewis was denied "all economically beneficial or productive use of land."

Abuse of the Police Power - In the present case the West Virginia courts did not stop at denial of inverse condemnation claims, they went further to allow an abuse of the police power. As noted by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,

> "When this seemingly absolute protection [Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."

Further clarification of when police power can be applied was given in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 at 593 (1962). This Court held that federal or state regulations prohibiting the use of property to protect the "...health, morals or safety of the community..." were an appropriate application of the police power when, "legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it..." Here, Lewis has been prevented from continuing a perfectly lawful use of his property. The city took advantage of damage caused by its own storm drain system to condemn the property under its flood plain ordinance. Such an action takes Lewis' property without either due process or just compensation. It is illegal.

2. The decision granting prospective injunctive relief conflicts with this Court's decisions that authorize such punitive destruction only in cases of emergency or imminent danger - The cases discussed in point one above illuminate the need to provide compensation for taking of the type applicable to the case before this Court. But, there is a related

issue: whether the city can order the building demolished - at the owner's expense and under threat of criminal prosecution - if there is no emergency. This Court's standard teaching is that it may not.[48]

The Circuit Court erred when it upheld Judge McCarthy's rulings granting prospective relief requiring Lewis to undertake an affirmative act to demolish a building, in the absence of factual development[49] and without distinguishing emergency police power considerations from those applicable to this case.[50]

The West Virginia Code and Ordinances of the City of Clarksburg, which explicitly provide a remedy if the owner fails to comply with the municipality's code enforcement action, state that the remedy "shall be a lien against the real property upon which such costs were incurred."[51] While the Building Commission may order demolition, the *only* express provision in the Code or the Ordinance, for recovery of costs, is the placing of a lien upon the property "after the sale of any and all salvageable material is credited to the account."[52] No such proper salvage occurred and no credits could be given

---

[48] See for example, *Hadacheck v. Sebastian* (1915) 239 U.S. 394 where a brickyard created a nuisance for its neighbors and *Miller v. Schoene* (1928) 276 U.S. 272 where cedar disease threatened a commercial apple crop.

[49] Judge McCarthy's recommendation was contingent upon a finding that the defects in the BOCA proceedings were not material nor prejudicial. This did not occur because the appeal was denied in the '90 case, and summary judgment was rendered in the '93 case.

[50] The West Virginia Supreme Court's ruling in *State Ex Rel State Line Sparkler v. Teach*, 418 S.E. 2d 585 W.Va. (1992) is distinguishable as that case involved the hazardous manufacture of explosive products after issuance of stop orders.

[51] *W.Va. Code* 8-16-12, and *Codified Ordinances of the City of Clarksburg* Section 1725.02(f).

[52] *Id.* 1725.02(f).

to Lewis.

Moreover, according to both Federal Rules of Civil Procedure Rule 57 and West Virginia Rules of Civil Procedure 57 Lewis was entitled to a jury[53] hearing on these matters. The ruling in the '90 case denies Lewis' Constitutional rights to due process under the Fifth and Sixth Amendments of the United States Constitution. Additionally, Lewis was denied the opportunity to present full evidentary support for his complaint.

Absent his Sixth Amendment rights Lewis faces 30 days in jail for each day he failed to demolish the building after April 1992. Since the Circuit Court merely upheld the BOCA Board ruling granting a right to incarceration and stating no maximum penalty, Lewis, now fifty-five, could spend the rest of his life in jail.

3. **The manner in which the Circuit Court of Harrison County acted denied Lewis his right to due process of law.**

Notice Announced by Judge on Day of Ruling - The Judge announced summary judgment. This deviates from Rule 56 which calls for a motion by one of the parties. Additionally, oral motions (or in this case oral notice) for summary judgment are not authorized under Rule 56.[54] When a motion for summary judgment is made, the moving party bears an initial burden of,

> "informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if

---

[53] In *McClung v. Marion County, 360 S.E.2d 221 (W. Va. 1987)* the state court ruled that these rights exist.

[54] *Cool Fuel, Inc. v. Connett* (9th Cir. 1982) 685 F2d 309, 311.

> any,' which it believes demonstrate the absence of a genuine issue of material fact."[55]

The judge did not fulfill these requirements.

Rule 56(c) also provides that : "the motion shall be served at least 10 days before the time fixed for the hearing." Several courts have ruled[56] in support of the ten day notice requirement. In *Celotex Corp. v. Catrett,* this Court held that lower courts could, "...enter summary judgment *sua sponte, so long as the losing party was on notice* that she had to come forward with all her evidence." (Emphasis added.) In this case there was : notice.

Discovery Denied - In *Anderson v. Liberty Lobby,* 477 U.S. 242 this Court ruled that the party opposing summary judgment must have had sufficient opportunity through discovery to gather the evidence necessary to avoid summary judgment, and that,

> "a continuance of summary judgment is mandatory upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion."

No such opportunity was afforded Lewis despite his counsel's objections. The decision below conflicts with the decisions of numerous other courts, holding that a motion to dismiss could not be converted to motion for summary judgment if a

---

[55] *Celotex Corp. v. Catrett,* 477 U.S. 317 (at 323).

[56] *Management Investors v. United Mine Workers of America,* C.A. 6th, 1979 610 F2d 384; *White v. Texas Am. Bank/Galleria,* N.A., 958 F.2d 80 (5th Cir. 1992); *Brooks V. Hussman Corp.,* 878 F.2d 115 (3d Cir. 1989).

In *Scott v. Courtesy Inns, Inc.,* C.A. 5th 1973, 472 F 2d 563. the court held that it was an error to treat defendant's motion to dismiss as a motion for summary judgment without first giving plaintiff at least ten days notice as required by the rules.

stay prevented the plaintiff from conducting discovery.[57] A failure to allow discovery has also been found to require reversal,[58] as this is a violation of constitutionally guaranteed due process rights.

Finally, rule 56(f), allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery. Lewis had been denied discovery by the protective order. The city's inability to locate records germain to the building similarly undermined discovery efforts.

No Opportunity to Present Evidence - A full and fair opportunity to develop and present facts and legal arguments in support of one's position is a critical part of a summary judgment ruling. Several cases illustrate broad support for this principle.[59]

Burden of Proof - Had evidence been submitted to defend against a motion for summary judgment the burden of proof would have required that the court consider the persuasiveness of evidence and plausibility of nonmovant's claim.[60] Additionally, while the nonmoving party bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at

---

[57] *Maritrend, Inc. v. Galveston Wharves, D.C. Tex.* 1993 152 F.R.d. 543. and *DiMartini v. Ferrin* (9th Cir. 1989) 889 F2d 922.

[58] *Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins. Co.*, 958 F.2d 836 (8th Cir. 1992).

[59] *Portsmouth Square v. Shareholders Protective Comm.* (9th Cir. 1985) 770 F2d 866, 869; *Cool Fuel, Inc. v. Connett* (9th Cir. 1982) 685 F2d 311-312. In *U.S. v. J.B. Williams Co.*, C.A. 2d, 1974, 498 F.2d 414 the court found a right to adduce testimony of live witnesses and cross-examine opponent's witnesses, if the party opposing summary judgment raises any triable fact questions.

[60] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

trial.[61] The nonmoving party creates a genuine issue of material fact if it provides sufficient evidence to allow a reasonable jury to find for him at trial.[62]

That's the way it is *supposed* to work. However, when the trial court considers the matter without notice and then refuses to permit discovery to allow the responding party to demonstrate the validity of his position, there has been an evident denial of due process.

The matter before the court involves numerous disputed material facts. Among them are: the property's condemnation under a floodplain ordinance (a type of inverse condemnation); breach of contract regarding the sewer; and trespass regarding the storm drain. Additionally, numerous matters including timeframes and cost, are in dispute. To allow summary judgment, as it was applied in this case, to stand is to set a precedent that will take summary judgment law into territory unforseen by its creators in 1938, and uncharted by any current law.

Had the city of Clarksburg addressed its responsibilities with regard to the storm and sewer systems the property would never have been condemned, all subsequent litigation could have been avoided, and abuses of Fifth, Sixth and Fourteenth Amendment rights would not have taken place. Clarksburg, West Virginia is a small town and a county seat. If this city's actions, and the county circuit court rulings

---

[61] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986). See also, *Sempier v. Johnson & Higgins*, 45 F.3d 724, 727 (3d Cir.), cert. denied, 115 S. Ct. 2611 (1995). Fed. R. Civ. P. 56(c). Sempier, 45 F.3d at 727; *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1413 (3d Cir.), cert. denied, 502 U.S. 941 (1991). III.

[62] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

upholding them are allowed to stand it will send a message. The message will be your city can violate your constitutional rights and the right to earn and hold private property fought for since the time of John Locke. The message, especially to citizens in small town America, will be you can't fight city hall, so don't even try.

CONCLUSION

For the foregoing reasons, I respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

Ellis R. Lewis, Pro Se
P.O. Box 2403
Riverside, Ca. 92516
(909)685-6675

June 20, 1997